STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2005
v	No. 249222 Charlevoix Circuit Court
BRUCE GUILFORD BARTON, JR., Defendant-Appellant.	LC No. 02-075309-AR

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant was charged in district court with operating a motor vehicle while under the influence of intoxicating liquor, MCL 257.625(1). A jury convicted him of the lesser offense of operating a motor vehicle while visibly impaired, MCL 257.625(3). Defendant appeals by leave granted from an order of the Charlevoix Circuit Court affirming his conviction. We affirm.

Defendant first argues that he was denied a fair trial when the district judge displayed hostility and bias in his questioning of defendant's expert witness. A thorough review of the record leads us to the conclusion that the district judge's questioning of the witness was improper, but that the error was harmless.

A trial judge has broad discretion with respect to controlling the trial proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). But the judge's discretion in questioning witnesses is not unlimited. The judge must avoid any invasion of the prosecutor's role and exercise caution so that his questions will not be intimidating, argumentative, prejudicial, unfair or partial. *People v Cole*, 349 Mich 175; 84 NW2d 711 (1957); *People v Jackson*, 97 Mich App 660, 662; 296 NW2d 135 (1980). The test for whether a new trial should be ordered has been stated as whether "a judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility,… and (whether) partiality 'quite possibly could have influenced the jury to the detriment of defendant's case.'" *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976), quoting *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975). When judicial comments or questions are challenged as being biased, the challenge constitutes a non-structural defect[1] that may be

[1] An example of a structural defect includes an impartial judge. *People v Anderson (After* (continued…)

reviewed under a harmless error test. *People v Weathersby*, 204 Mich App 98, 110-111; 514 NW2d 493 (1994). The beneficiary of the error (here, the prosecutor) has the burden of establishing that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *Anderson (After Remand), supra*.

The record indicates that the district judge tried to ensure a fair and legally proper trial in general. However, the district judge's questioning of the defense expert openly challenged the expert's credentials and the expert's reliance on certain source materials to conclude that defendant's blood alcohol level could not have been over the legal limit for driving while intoxicated at the time of his arrest. The tone of the questioning clearly indicated that the judge viewed the expert's testimony with incredulity. This was improper.

Nevertheless, we find the error to be harmless. Clearly, the testimony of the defense expert challenged only the blood alcohol level element of the offense of driving while intoxicated. The expert never opined that the amount of alcohol defendant admitted consuming could not result in his driving while impaired. That the district judge's apparent bias is harmless error is established by the fact that defendant was acquitted of driving while intoxicated. The jury must have concluded that defendant's blood alcohol level was not proven beyond a reasonable doubt to support a conviction of driving while intoxicated. In effect, the jury sided *with* the position of the defense and *against* the district judge in his effort to impeach the credibility of the expert witness. Since defendant does not claim that his conviction of driving while visibly impaired was the result of jury compromise, or that there was insufficient evidence to support his conviction of driving while visibly impaired,[2] we conclude that the district judge's inappropriate questioning of the defense witness was harmless error. *Carines, supra* at 774.

Defendant next argues that he was deprived of a fair trial by the district judge's refusal to permit him to perform a demonstration calling into question the arresting officer's ability to judge the speed he was traveling prior to the stop and arrest. We disagree.

A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "Evidence which is not relevant is not admissible." MRE 402. "'Relevant evidence' means evidence having any tendency to make the

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(…continued)

Remand), 446 Mich 392, 405; 521 NW2d 538 (1994), citing *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 2d 749 (1927) (one who is convicted before the mayor of a village, which received a portion of the fine collected, held denied due process in view of the mayor's representation of village). The error alleged by defendant in the instant case does not constitute a structural defect because the trial judge was not the fact-finder. Rather the error dealt with the presentation of the case to the jury, and thus was non-structural. See *Anderson (After Remand), supra* at 405.

[2] We note that the arresting officer testified that he believed defendant was driving while impaired due to (1) his speeding, (2) his tardiness in responding to the officer's direction to pull over, (3) his heavy smell of alcohol, and (4) his dropping some papers. Although the officer described defendant as composed, rational, and not exhibiting abnormal characteristics, this does not mitigate against a finding of impairment. Moreover, given defendant's admission of drinking five beers over a period of time and on a relatively empty stomach, the evidence was sufficient to establish beyond a reasonable doubt that defendant was driving while impaired.

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Defendant argues that a demonstration of the acuity of the arresting officer's powers of observation had a bearing on whether there was probable cause for the arrest. Probable cause for arrest is not a jury question. Defendant was being tried on a charge of driving while intoxicated. Whether the officer was correct as to defendant speeding is not relevant to whether defendant had been drinking alcohol. And, even if defendant could demonstrate that the officer erred in his estimation of speed, this would not necessarily establish that there was not probable cause to effectuate the stop. "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). Even assuming defendant could show that the officer erred in estimating defendant's speed, this would not conclusively establish that the officer had not acted with ordinary prudence and caution or that he did not entertain a reasonable belief that defendant was speeding. Moreover, to the extent such evidence was marginally relevant to the question of defendant's guilt of the charged offense, it was properly excluded under MRE 404 as likely to lead to juror confusion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra

I concur in result only.

/s/ Bill Schuette